not being cumulative. *De Loach & Co.* v. *Aetna Ins. Co.* (1908), — Ga. App. —, 62 S. E. 473.

Other insurance was here defined to be "insurance in addition to that effected by the policy itself" and was held to include the prior policy. This was a correct holding. *Georgia Home Ins. Co.* v. *Campbell,* 102 Ga. 106; *Behrens* v. *Germania Ins. Co.,* 58 Ia. 26. The Supreme Court of Texas goes even farther and holds that the term "total concurrent insurance" includes the amount of the policy on which it is written. *East Texas Fire Ins. Co.* v. *Blum,* 76 Tex. 653. But no case has been found where the prior policy was issued by the same company. A consideration of the object in limiting the amount of concurrent insurance shows that the rule should be the same even in this case, where no estoppel intervenes. Insurance is an aleatory, not a wagering contract. To secure its integrity as such, the insured must be made to lose something in case of a total loss, which can only be accomplished by limiting the amount of insurance to a sum smaller than the value of the property insured. COOLEY, BRIEFS ON THE LAW OF INSURANCE, Vol. 2, p. 1831. The permits were not cumulative, for to so hold would allow insurance in excess of the value of the goods insured. The court was correct, then, in holding the policies avoided; the insurance exceeded either permit. But it would seem that the court enunciated an erroneous rule to apply to cases of this kind. The proper rule, it is believed, would give effect to the latter permit only. It is to be noted in the principal case that the total aggregate insurance allowed by the last policy was smaller than the amount allowed under the first. The insurer may have wished increased protection against bad faith upon an assumption of a larger proportion of the risk. It is a well settled principle of contract law that a subsequent agreement between the same parties concerning the same subject matter discharges the prior agreement in so far as such prior agreement is necessarily inconsistent with the subsequent agreement. 9 CYC., p. 596. The permits were not cumulative. Effect could be given to only one of them. In other words, they were necessarily inconsistent with each other. The subsequent agreement should then control.

INSURANCE—SUBROGATION—ACCIDENT INSURANCE.—Plaintiff met with an accident on defendant's railroad. The accident being covered by his accident insurance policy, he was paid the insurance. In a suit to recover damages for the negligent injury, *held,* that no right to subrogation exists in favor of accident insurers, therefore it is not necessary that the insurer be made a joint plaintiff. *Gatzweiler* v. *Milwaukee Electric Ry. & Light Co.* (1908), — Wis. —, 116 N. W. 633.

The right of the accident insurer to subrogation to the rights of the insured against his negligent injurer has been judicially passed upon in but one American decision previous to the principal case. *Aetna Life Insurance Co.* v. *Parker,* 30 Tex. Civ. App. 521, affirmed, 96 Tex. 287. The principal case cites and follows this decision. In the Texas case the insured had settled with the wrongdoer, and in a suit on the policy the insurer insisted that this fact released them from the policy, as it destroyed their right

to subrogation. The appellate court, while admitting the contract of accident insurance to be an indemnity contract, held that no right to subrogation existed on the ground that there was no identity of damage, the tort feasor being liable in fuller damages than those indemnified against by the policy, the insurance covering simply the physical injury, while the wrongdoer was liable for injury to feelings, and in exemplary damages, etc. Thus it is attempted to differentiate accident from fire insurance. But does the fact that the property destroyed is not in all respects identical with that insured defeat subrogation? The Supreme Court of Texas in affirming the decision rested upon the ground that accident insurance is more nearly allied to life than to fire insurance, and calls attention to the English case of *Bradburn* v. *Great Western Railway Co.* (L. R. 10 Ex. 1). This case holds that in an action against an injurer the amount of insurance received under an accident policy cannot be taken into consideration in mitigation of damages. The reason assigned is that accident insurance is not indemnity insurance, but is simply a property right bought and paid for. The happening of the accident simply fixes the time when the sum shall be due. The principal case follows this reasoning exactly and allies accident with life insurance. There is no right to subrogation in the case of life insurance. *Mobile Life Insurance Co.* v. *Brame,* 95 U. S. 754; *Conn. Mut. Life Ins. Co.* v. *N. Y. & N. H. R. Co.,* 25 Conn. 265. But the reason is not only that life insurance is not strictly indemnity insurance, but because the right of action which Lord CAMPBELL'S Act gives against one wrongfully causing the death of another belongs to specific persons therein enumerated. It does not belong to the insured or to his estate and thus cannot pass to the insurer. But in the case of accident insurance there is a right of action in favor of the person injured, and it is difficult to see why the accident insurer should not be subrogated to this right. Accident insurance is to a great extent indemnity insurance. VANCE, INSURANCE, p. 478; *Harding* v. *Townshend,* 43 Vt. 536. The chief objection to thus considering it is that definite amounts become payable on the happening of the contingency, seemingly without reference to the actual loss sustained, thus giving an accident policy more the character of a valued than an indemnity policy. It must be conceded that indemnity insurance for accidents would be possible and proper. To life and health there is a *pretium affectionis.* In the nature of things, then, the amount of indemnity must be fixed in advance. The fact that the parties, in order to put the transaction on a business basis, are forced to stipulate in the policy what the loss shall be assessed at, should not conclusively take away the indemnity feature. In fire insurance it is perfectly competent for the parties to agree on the value of the things insured, and in the absence of fraud this is conclusive. *Harris* v. *Ins. Co.,* 5 Johns. (N. Y.) 368. In *Harding* v. *Townshend,* supra, the same question came up as was before the court in the English case above commented on. Here again it was decided that the insurance received could not be considered in mitigation of damages, but on a different and, it is believed, a more logical principle. The court inquires as to who, between the insurer and the tort feasor, ought ultimately to

bear the loss, thus necessarily admitting that the insurance was indemnity insurance. They arrived at the conclusion that the one causing the injury should bear the loss. The recovery of the whole sum from the wrong-doer, then, "only creates an equity between the plaintiff and the insurer, *to be ultimately adjusted between them.*" This decision, it would seem, might well have entered into the discussion of the court in the principal case.

JUDGMENT—CONCLUSIVENESS OF DECISION OF UNITED STATES COMMISSIONER ON COLLATERAL ATTACK.—A Chinese person returning to the United States from a trip to China claimed to be a citizen of the United States and therefore entitled to enter the country. As evidence in support of this claim he produced a certificate of a United States commissioner reciting that Lung Wing Wun (whom he claimed to be), a Chinese person, was lawfully in the United States, contending that the certificate should be conclusive as to his right to remain in this country. The commissioner, however, heard other evidence, decided against the claimant's right to remain, and ordered that he be deported. On an application for a writ of habeas corpus, the question as to the right of the courts to review the findings of the United States commissioners was raised. *Held,* that the jurisdiction of the commissioner depended upon whether or not the Chinese person was a citizen of the United States; that if he was a citizen the Chinese Exclusion Laws had no application to him and the commissioner was without jurisdiction; that the decisions of a United States commissioner are not final, but may be reviewed by the courts, and that the status of a party is a question that the courts, and not a commissioner, should decide. *Ex parte Lung Wing Wun* (1908), — D. C., W. D., Wash. N. D. —, 161 Fed. 211.

The authorities are conflicting as to the conclusiveness on collateral attack of the decisions of United States commissioners. Some decisions hold that all questions of fact relating to the admission of Chinese persons, including the question of citizenship, must be decided by the commissioner, and that such decision is due process of law; that due process of law does not necessarily require a judicial trial, and that the decision of the questions involved in the admission or exclusion of Chinese may properly be left to an executive officer. *United States* v. *Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644; *Lem Moon Sing* v. *United States,* 158 U. S. 538, 15 Sup. Ct. 967; *In re Chin Yuen Sing* (C. C.), 65 Fed. 571; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 13 Sup. Ct. 1016. Other cases hold that the decision of a United States commissioner is reviewable by the courts only in case of manifest error. *United States* v. *Chung Fung Sun,* 63 Fed. 261; *Ex parte Jong Jim Hong* (C. C.), 157 Fed. 447; *Ex parte Lee Kow,* 161 Fed. 592. On the other hand, it is claimed that the question of citizenship is a jurisdictional question on which the decision of the commissioner is not final, and does not constitute due process of law. Dissenting opinion of Mr. Justice BREWER in *United States* v. *Ju Toy,* supra; *In re Tom Yum* (D. C.), 64 Fed. 485. Other cases hold that the act of Congress which attempted to make the decision of the commissioner final never became effective, as it